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## **EXAMINATION OF AGREEMENT, EXHIBIT "B"— THE PEOPLE VS. COLBY.**

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By GEO. E. FELL, M. D., F. R. M. S., Buffalo, N. Y.

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In April, 1883, the original document of which that on the previous page is an attempted fac-simile, was first placed in my possession by the District Attorney, Hon. E. W. Hatch, of Erie Co., N. Y., with the request that I should make a careful examination of it and report the results at a convenient season.

For obvious reasons no instructions of a detailed nature were tendered me, I was given full liberty and directed to make a complete report. In the following paper I propose to give the principal facts connected with the examination of this interesting document, which was presented as evidence in the case, entitled "The People vs. Jesse Colby," and tried in the Court of Sessions, Erie Co., N. Y., before Hon. Wm. W. Hammond and a jury, in the city of Buffalo, December 19th to 27th, 1883. The legal features of the case will only be considered so far as they relate to the document in question and to the testimony of the experts who were called into the case. A casual examination of the document without a lens, indicates that it is a bill of sale signed by two parties—Jesse Colby and Julia Martin. The body of the document was apparently drawn up by Jesse Colby, whose name appears two or three times in the body of the paper, and bears so strong a resemblance to his signature as to leave no doubt of this fact. All that portion of the document, excepting the signature, Julia Martin, was written with a heavy hand and one not accustomed to writing, or not very expert with the pen. The signature, Julia Martin, presents a marked contrast to the body of the document, the lines being clean cut, and wanting in the scratches and irregularities presented by those of the rest of the document. In this is excepted the printed heading, Alden, N. Y., etc.

I will now carry you further into this investigation, and will use

a two inch objective with a two inch ocular, as we cannot proceed satisfactorily in the examination without the aid of the microscope. We may use reflected or transmitted light, with nearly the same results. The examination with this power revealed that the whole of the written portion of the document, from the word "March" to, and including the signature, "Jesse Colby," had been traced over with a *heavy black ink*. This, in some portions of the document, could be seen with the naked eye by close observation. Furthermore, under the two inch and higher powers of the microscope, it was observed that the original ink of the body of the document, was similar to that of the signature 'Julia Martin,' excepting in the words, "and Colby's bond is hereby canceled." In the latter the first written ink has a brownish tinge the other does not possess.

"After satisfying myself of these different appearances I reported my views to Mr. Hatch, who requested me to associate some other competent observer with myself for the purpose of substantiating my conclusions, if correct. I called our very worthy Secretary, D. S. Kellicott, into the case, and we proceeded to make a thorough and exhaustive examination of the document. Before working in conjunction I requested him to make an examination by his own methods and give me his opinion. To indicate the course pursued, I give you Prof. Kellicott's own words from his report of the case to District Attorney Hatch. After stating that the "Agreement" was taken to him, at his house, by Dr. Fell, with the request that he examine it, he said: "I requested Dr. Fell to say nothing about the case or the paper in any way, as I knew nothing of the matter, and wanted to be free from any predilection. He said nothing about it and handed me the paper. After examination with a pocket magnifier, and subsequently with the compound microscope, I wrote out the following conclusions:

"1.—The whole paper, except the signature 'Julia Martin,' was written by the same person as the signature 'Jesse Colby.'

"2.—The agreement was originally written and signed with pale yellow ink.

"3.—The whole agreement, except the signature 'Julia Martin,' has subsequently been traced over with much blacker, thicker ink.

"4.—I can find no erasures or changed words except in a few instances like 'bond,' last line, in which the writer appears to have corrected mistakes or slips of the pen.

"I then asked Dr. Fell if he wished me to examine special

Albion, N. Y. March 31<sup>st</sup> 1880

ment  
This agree<sup>ment</sup> made this day - between Jeph  
Cobb & Julia Martin in the sale of farm  
it is agreed and understood that all of the  
preses traps seals traps heaters and every  
thing in any way belonging<sup>to</sup> Cheese factory  
to go with the farm, and it is further agreed  
that Cobb is to have the use of that part  
of the house that Gifford now occupies  
for one year and room for <sup>4</sup> extra <sup>to</sup> ~~the~~  
and room to store hay for winter  
farm, and one half of the manure now  
on farm and also what manure Cobby  
horses & cattle make on farm, and Cobby  
Bond is hereby canceled Jeph Cobb  
Julia Martin

points. He said, 'Examine the original ink of the document and signatures.' I did so, using higher powers of the microscope than before, and concluded that the last clause 'and Colby's bond,' etc., was written with ink of a different color from that in the rest of the document—that the last line was of a reddish or brownish hue, while the balance was bluish."

Thus far we had come to virtually similar conclusions, working independently of each other. It now remained to satisfy *ourselves* of the justness of these conclusions, more particularly relating to the difference of color in the original or first written ink of both the words 'and Colby's bond is hereby canceled,' and that of the rest of the document. For this purpose a series of tests were made in the following manner. Certain parts of the document were placed "under the microscope," and the former covered by a cloth or paper, to effectually conceal from the view of the observer all but that portion in the focus of the objective. Records were made of these observations with the following results: In the following nineteen observations I arranged the document, manipulated the instrument, and recorded the results while Prof. Kellicott made the observations.

NO.	LETTER.	WORD.	PALE INK.	BROWN INK.	RESULT.
1	....	"Martin," (of signature.)	Pale.	.....	+
2	....	"Colby," (of signature.)	"	.....	+
3	....	"Martin," (of signature.)	"	.....	+
4	....	"Colby," (of signature.)	"	.....	+
5	....	"Colby," (of Colby's Bond.)	.....	Brown or red.	+
6	....	"Colby," (of Colby's Bond.)	.....	" "	+
7	2d.e	In "every."	Pale.	.....	+
8	l	"Colby's" (signature.)	"	.....	+
9	d	"And" (of and Colby's.)	.....	Brown.	+
10	s	"Jesse" (signature.)	Pale.	.....	+
11	d	"Canceled."	.....	Brown.	+
12	n	"Canceled."	.....	"	+
13	o	"Also."	Pale.	.....	+
14	f	"Farm."	"	.....	+
15	a	"And" (and Colby's.)	.....	Brown.	+
16	o	"On farm," (see below.)			
17	e	(Thereby.)	.....	Brown.	+
18	i	"Is" (hereby.)	.....	"	+
19	d	"Bond."	.....	"	+

NOTE.—In No 16 Prof. Kellicott stated first,—he thought it brown ink, but observed the second time and concluded to call it blue. Hence, of these nineteen observations, but one was negative and that one uncertain. I was subjected to a number of tests of a similar nature in which Prof. Kellicott manipulated the instrument and recorded the results as follows:

NO.	LETTER.	WORD.	PALE INK.	BROWN INK.	RESULT.
1	a	In "canceled."	.....	Brown.	+
2		Unrecorded, but,	.....	.....	+
3	m	In make.	Pale.	.....	+
4	h	In "half of."	.....	.....	+
5	n	In fourth line from below.	Pale.	.....	-
6	s	"Occupier."	Not	Recorded but	+

The results are not so favorable to a difference in the color of the ink, as out of six observations one was negative. However, these were among the first trials made; subsequently, our ability to distinguish between the two shades of ink, was much more marked.

It might be surmised that the results of these experiments would have convinced us of the certainty of three different inks being used in the document. Not sufficient to my mind, however, to enable me to swear positively that they were different, excepting of course, the thick, black tracing ink. This was cleared up, as we shall see, by a further examination of the document at the residence, this time, of Mr. Henry Mills, December 18th, 1883, who was interested in the case with us.

At this time every letter and word of the paper was examined with suitable powers from the two inch to the one-half inch objective, and any departure from the ordinary appearance noted:

Beginning with "March 31st." The first stroke of the word is nearly straight, and of the blue or pale ink. The brown ink begins a little above the pale ink and runs toward the center of the letter, while the tracing black ink begins outwardly and above the rest of the stroke, runs across the original, parallel to and between it and the original. The decided proof that three different inks have been used in the document, is seen in the downward stroke of the letter "t," of "31st," and particularly at its termination where the original ink is turned up more than the others, the brownish ink comes next and the black or tracing ink follows the brown, but not to its termination. In the "31" three strokes are clearly discernable in the upward turn of the "3;" the position of the pen at the beginning of each of the strokes is also plainly to be seen and at the top of the curve the strokes are also distinct. In the word "March" the original ink is seen in the letter "M," the brown ink is absent from "a," all three are to be seen in the letter "h," and in the ter

mination of the "r" each ending is different. I am desirous of giving the observations which prove the existence of the three kinds of ink in the document, as testimony was produced by an expert in the examination of handwriting to the effect that but two different inks were used in the document. The noticeable features in the rest of the document were as follows: The carat after the word "agree" was written with brown ink; the word "ment" was written over twice before tracing. The termination of the letter "a" of the word "heaters" shows the three strokes and the letter appears to have been made over with brown ink. In the "e" of the word "every" the three inks could be seen. The letter "c" of the word "cattle" was three times written. Throughout the sentence "and Colby's bond is hereby canceled" the brown ink is noticeable traced over with the black ink, but none of the original ink is to be seen. The "can" of the word "canceled" is written twice with brown ink. In Colby's signature the original ink is traced over with the black, but no brown ink is discernible. The signature of Julia Martin is written only with the original ink in the document.

It may be well to state that in the copy of this document which you have before you, it would be difficult to make out many of the interesting features I have attempted to describe. I do not know any process by which a document of so great interest chirographically could be reproduced so as to represent under the microscope the exact similarities of detail.

I have now given you the results of the microscopical examination of the document, and throughout this case the importance of the microscope in such examinations was made apparent and cannot be over-stated. Experts in the examination of handwriting, in my opinion, are not fully equipped for their work until they are supplied with a good compound microscope, supplied with powers ranging from twenty to two hundred diameters.

Mr. Henry Mills, who was likewise interested in the case as an expert, coincided with the results of the examinations arrived at by Prof. Kellicott and myself.

It will prove interesting to consider some of the testimony relating to this document, given in the two cases, civil and criminal, in which it was produced as evidence.

TESTIMONY REGARDING EXHIBIT "B," CIVIL SUIT, SUPREME COURT,  
ERIE COUNTY.—JULIA MARTIN VS. JESSE COLBY, JAN., 1882.

Page 196.—"Jesse Colby testifies that 'B' was signed by Mrs. Martin, in his house (31st March.)"

Page 199.—"That the paper 'B' was read over to Mrs. Martin before she signed it."

Page 223.—"That it appears *just as now* (then)—thinks it does—is in his handwriting, drew it at the same time he drew these deeds, but did not write it with the same ink with which he drew the deeds, he kept two or three kinds of ink, drew the paper in the dining-room at his desk; had a poor pen, etc.; did not draw the paper in the presence of Mrs. Martin."

Page 226.—"He should not think the words 'and Colby's, etc.,' was written in a different ink from the rest of the document."

Page 227.—"Was drawn at the same time."

Page 228.—"States that 'B' was not signed with the same ink as the deed, and that she signed with a different ink from what he did."

Page 233.—"Read the document aloud to her, and also the words 'and Colby's bond is hereby,' etc., and she signed it willingly."

Page 236.—"Did not give her a copy of the agreement, or offer her a copy."

Page 237.—"Did not show it to Squire Peck when he obtained the bond from him."

TESTIMONY RELATING TO DOCUMENT IN "PEOPLE VS. COLBY."

Page 30.—Mrs. Martin in answer to question, "Did he (Colby) read over to you any paper which you signed that recited 'that Colby's bond was hereby canceled'?"

Ans.—"Nothing of the kind."

Page 32.—Quest. "Did you ever, at any time, make any agreement with Colby to surrender up and cancel this bond?"

Ans.—"No, sir."

Page 53.—Quest.—"Your claim is that you did not know the bond was canceled on the 31st day of March."

Ans.—"Of course I didn't. I didn't suppose there was any such thing coming up, that the bond was to be canceled."



Julia Martin vs. Jesse Colby (page 29), Mrs. Martin testifies: "that she was at Mr. Colby's house March 31st; she didn't sign any papers there that day, nor wasn't asked to." On being shown the exhibit 'B' she stated "she did not sign that March 31st; that it resembles her signature; that she did not take a pen in her hand that day."

Mr. Martin testifies (page 83), "that there was nothing said at this time about surrendering or canceling the agreement or contract, and that his wife did not sign any papers at Mr. Colby's that day."

It is thus seen that there existed a great difference of opinion between Mr. and Mrs. Martin and Mr. Colby as to when and where exhibit "B" was signed.

I will not say anything further regarding the testimony in the case except that relating directly to exhibit "B." The concise account of the case given by the plaintiff's attorney Mr. L. P. Perkins, and to which I will refer you later, may enable you to obtain a clearer knowledge of the case than I could present as a chirographical examiner.

The facts connected with the examination of the document as reported, were given on the witness-stand by Messrs. Mills, Kellicott and myself. I was the first of the three witnesses called, and was subjected to a rigid cross-examination for some three or four hours. Prof. Kellicott was likewise on the stand a long time and subjected to a similar ordeal, as was also Mr. Mills.

In view of the subsequent developments in the case, this evident endeavor on the part of the defense to undermine the evidence of the experts as to the general features of the document, will be seen to be remarkable. They attempted to show that microscopists differed greatly in the results obtained by their examinations, and cited the case of Dr. Gregg, if I may be excused for mentioning it, in the *bacteria-forming fibrin* question. To this both Prof. Kellicott and myself testified that we did not consider Dr. Gregg a microscopist.

An attempt was made to show that two different colors might be produced from the same ink, if the dips were taken from the top or bottom of the vessel. In answer to this my opinion was given as follows: That no difference in the color could be produced by taking the ink from top or bottom, excluding sediment. It was admitted that a difference in the intensity of the color might be pro-

duced. Subsequent experiments confirm my views on this question. Question after question regarding the *technique* of the microscope, was propounded, and every known ruse of the wily attorney used to weaken the testimony of the experts with the microscope, but without any effect upon their evidence.

Experts in the examination of handwriting were found, who I trust, honestly differed with the microscopists regarding the differences in the inks used in the document. It is stated that one of these experts testified that the original ink in the words "and Colby's bond, etc.," was written with the same ink as that of the body of the document.

Testimony of Marcus Bartlett for the defense. (From Court Record.) "Is a clerk in the County Clerk's Office; has had fifteen years' experience in writing; the words 'and Colby's bond, etc.,' was written in the same ink as body of the instrument originally; examined the paper with a magnifying-glass; think the whole paper was written with the same ink; the original ink was lighter; I think it was an ordinary blue ink; sees but two colors, one blue and the other bluish-black."

That the examination with the microscope and the three different inks side by side in some portions of the document, upsets this testimony, no sane man could question.

We now come to another phase in the case which is difficult to explain on reasonable grounds. It will be remembered that the defense used every effort to invalidate the testimony of the microscopical experts by a long and searching cross-examination. They even went so far as to have another expert with the microscope called in to examine the document, and also another member of this Society. This gentleman it was subsequently ascertained was Mr. Edward S. Nott, of Hamburg, N. Y. We commend the good judgment of the defendant's attorneys in choosing so able an opponent. What is *not* remarkable, however, is that Mr. Nott agreed with the three other members of this Society who examined the document as to each and every detail and so reported to the defendant's attorneys, in his presence. *Mr. Nott was not called for the defense.*

The most remarkable testimony in the case is yet to come.

Testimony of Mrs. Wright as condensed from the Trial Minutes

(page 124-5-6.) "Am a daughter of Mr. Colby; on the 31st heard about the bond read in the paper; there was a purple ink, black ink, brown ink and a lighter brown ink in the desk; *traced\** the paper exhibit 'B;' could not tell from which bottle the ink come from, that is in the signature Jesse Colby; could not tell from which bottle the ink come, with which the original document was written; she could not tell from which bottle the ink was taken to make the first tracing; the second tracing came from her bottle of black ink; she thinks she used two kinds of ink in making the tracing; she traced exhibit 'B' not long after it was written, it might have been a week or more; she found it on top of the desk; her cousin Miss Howard, was there; she didn't recollect what they were talking about except this paper 'B;' does not remember ever tracing a paper before or since; had her own gold pen she thinks; could give no reason why she did it; she knew of her father's suit with the Martins; was sworn on that trial; had heard of exhibit 'B;' *she did not say then that she traced it;*\* told her husband about it; could not tell how long ago it was; don't think she traced it over three times; thinks she traced some parts of it more than once; could not tell which parts; traced some parts of it with one kind of ink and went all over it with the other; don't recollect from which bottle ink was taken for first tracing. In the previous trial her attention was not called to the fact that the paper was traced; she had the paper in her hand and saw the signature of Julia Martin; swore she saw her sign it, but did not think of having traced the paper."

A Miss Howard, a niece of Mr. Colby, testified, "That she saw Mrs. Wright trace the paper, she took up the paper from the desk, said it was an agreement between her father and Mrs. Martin; it was pale," etc.

That this is remarkable testimony no one will dispute. I will not attempt to fathom it. I have presented the results of the examination of this document to the Society, believing that the general method adopted in its examination would prove of interest and value to members who have never been called into a chirographical case; much more of interest could be mentioned had the testimony of the

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\* Italics are mine.—G. E. F.

experts been accessible; it was, however, not type-written, and consequently notes and memoranda here and there of an authentic nature were utilized so far as possible in the preparation of this paper.

I append a resume of the case, kindly furnished me by the plaintiff's attorney. It may throw some light on the case not covered in the previous statements.

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RESUMÉ OF CASE—JULIA MARTIN VS. JESSE COLBY.—BY MR. L. P. PERKINS.

DEAR DOCTOR:—You make inquiry regarding the above action. I will give it you in brief :

First.—The whole matter grew out of a certain contract made by Colby for the sale of one hundred and sixty acres of land, situated in Alden, Erie Co., N. Y., dated and made February 5th, 1880. This contract arose out of the following circumstances, viz: Some thirty-six years since, Oliver Martin, the husband of the plaintiff, purchased and became the owner of the farm in question. He paid for it and prospered for a number of years, was solvent and credit good. However, to enlarge his business he borrowed some money, and incumbered his farm to some extent, but a change of times embarrassed him. He owed a limited amount of floating debts, not secured. At this stage in his affairs, a Dr. Cornwall, of Alden village, learned his true financial condition, and in an apparently friendly manner proffered his assistance. Mr. Martin, however, saw no difficulty in arranging his affairs if he could be left alone; he thanked the Doctor and went about his business. Soon, very soon, every one of his creditors began to press for payment. He paid a portion of them and was led to make inquiry into the cause of all these creditors coming at once. He was not long in learning that Cornwall was behind the scenes pressing them forward.

Finally he was led to accept a loan of the Doctor of about \$800. and to secure the same gave a mortgage on his farm, running for a short time. The moment this mortgage fell due the Doctor foreclosed, sold the whole farm, bid it in and took title himself. He then told Martin and wife to remain on the farm and they should have it for what it had cost him, he, Martin, to pay all the taxes and assessments thereon.

Mr. Martin attempted to raise money by loan to pay the Doctor and get title, but he soon learned that certain influences were brought to bear upon every one to whom he made application for a loan, which defeated the application, and he utterly failed to accomplish his purpose in that direction.

Finally, on the fifth day of February, 1880, Dr. Cornwall sent for Martin and wife to come to his office in Alden village, for what purpose they knew not. When they arrived there they found the Doctor and Jesse Colby in the office con-

sulting about some matter of business, and when they had concluded the Doctor informed them that he had sold the farm to Colby, and that Colby would give Mrs. Martin a contract for a deed of the same if she would pay him the sum of \$5,850, and interest thereon in one year from that date—he, Colby to have the full possession thereof until the whole sum and interest was paid—except that Mrs. Martin could have the thirty-five acres on the north side of the highway, including the cheese factory and other buildings thereon for the rental of \$250 per annum.

All this was agreed to, and Benjamin F. Peck, a justice of the peace in the village, was employed to draw the papers. A deed was drawn from Dr. Cornwell to Colby, and a contract from Colby to Mrs. Martin and executed. Colby alone signed the Contract or Bond for a deed. These papers all bear date February 5th, 1880.

On this occasion Colby requested Mrs. Martin to give him a bill of sale of the tools, machines, fixtures, etc., in the cheese house. She consented and Colby drew up a bill of sale to that effect and handed it to her to sign. She signed it, and at the same time signed *another paper*, handed her by Colby, which *she supposed to be the contract or bond which Colby had executed*, but on the trial of the *Specific Performance* case hereinafter mentioned, it turned out that Mrs. Martin did not sign the contract or bond at all. She stated however, in the most positive and unequivocal terms that she actually signed *two papers* at Dr. Cornwall's office on the fifth day of February, 1880, one of which she supposed at that time to be the contract. Colby on the same trial positively denied under oath that Mrs. Martin gave him a bill of sale of the tools and fixtures in the cheese factory.

At this stage of the trial Esquire Peck returned home and examined among his file of papers, *and actually found* the bill of sale in his possession, having been left by the parties together with the contract or bond.

Between the date of said contract and the thirty-first day of March following Colby called on the Martins a number of times, and asked them as a special favor to take from him at once a deed of the thirty-five acres on the north side of the road and give him back a mortgage of \$2,200, payable in ten years. They hesitated, but after consulting Esquire Peck and other parties they consented to do so, and on the thirty-first day of March, 1880, the Martins repaired to the residence of Mr. Colby, then in West Alden, and on their arrival met Mr. Colby, his wife and their daughter, Mrs. Wright. The business which had called them together was talked over, and among other things Mr. Martin made special inquiry as to the whereabouts of Esquire Martin and a Mr. Eels, a merchant in the place, one of whom he, Colby, had agreed should be there to draw the papers. He was informed by Colby that they had both gone to Buffalo and could not be present for the purposes stated. Colby said he could draw the papers himself, and proceeded to do so.

After he had commenced to draw the deed, bond and mortgage, Mrs. Martin said to him, that inasmuch as they were taking a deed of the place she should have a bill of sale of the cheese house, tools and fixtures. Colby assented to this and

drew said bill of sale from him to Mrs. Martin, and signed it. He then completed the other papers soon after dinner, and the Martins left for home.

On their way they stopped at Esquire Peck's and executed the bond and mortgage before him, and left them for Colby to call and take to Buffalo for record, together with the deed, by the previous arrangement.

During all this time, in all the intercourse had between Colby and the Martins, between the fifth day of February and the thirty-first day of March, 1880, *not one word had been said about surrendering or canceling the bond or contract, as related to the one hundred and twenty-five acres of said farm on the south side of the highway.* Martin and wife so testify, both on the trial of the suit and the criminal action tried against Colby for perjury, as will be remembered.

Again recurring to the thirty-first of March, 1880, as to what transpired at Colby's house, both Mr. and Mrs. Martin testified that Mrs. Martin did not sign any paper there at Colby's house that day. That she did not take a pen in her hand while there, to sign her name or otherwise. She is shown the traced or spurious paper in question which Colby testified on the civil trial that he wrote first *as it then and now appears*, and she said she could not say but what her signature thereto was genuine, but she did not sign it there that day, and hence the only way she or any one else could account for it was, that it was one of the *two papers* she signed at Dr. Cornwall's house the fifth day of February, 1880. It was shown that she did sign a bill of sale of the cheese factory fixtures, *which was one paper*, and that the spurious paper was the other, and afterwards *traced and altered* over by Colby in the shape it now appears in order to get the words "*and Colby's bond is hereby canceled,*" and have the whole to appear to have been written at one time and with the same ink. Their defense depended entirely upon this spurious document. Judge Haight threw it out entirely; looked upon it as bad, and so decided.

Again recurring to the transactions of March 31st, 1880, it will be observed that the next day Colby called at Esquire Peck's and prevailed on him to surrender the bond. Colby did not show Peck the *spurious document* or any other authority from the Martins.

When they called at Peck's and executed the bond and mortgage March 31st, they gave no directions to him (Peck) to surrender the bond or contract in his hands. Before the civil trial Colby never showed this spurious paper to any one, or told any person that he had it. It was let out in their answer, but not seen until put in evidence on the civil trial. In this (civil trial) Mrs. Martin won the suit.

Respectfully,

L. P. PERKINS.

BUFFALO, N. Y., Aug. 12, 1884.